

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ADAM DANIEL ROICE,

Plaintiff,

**9:15-cv-26
(GLS/DJS)**

v.

THE COUNTY OF FULTON et al.,

Defendant.

ORDER

The court has identified grounds that may entitle defendants Fulton County, Thomas Lorey, and Amy Gagne to summary judgment on Roice's third cause of action for "[n]egligent [s]upervision/[r]etention of [e]mployee" under New York law. (Compl., Dkt. No. 1 ¶¶ 42-44.) Fed. R. Civ. P. 56(f)(2) "expressly allows the court to grant a motion for summary judgment on grounds that were not raised in the motion, but only after giving the opposing party notice and the opportunity to oppose." *Nick's Garage, Inc. v. Nationwide Mut. Ins. Co.*, 715 F. App'x 31, 34 (2d Cir. 2017).

"To state a claim for negligent supervision or retention under New York law, in addition to the standard elements of negligence, a plaintiff

must show: (1) that the tort-feasor and the defendant were in an employee-employer relationship, . . . (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence, . . . and (3) that the tort was committed on the employer's premises or with the employer's chattels[.]” *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004) (internal quotation marks and citations omitted). Given those elements, and the summary judgment record, it appears that the County, Lorey, and/or Gagne may be entitled to summary judgment on Roice's third cause of action.

ORDERED that the County and Lorey shall submit a brief no longer than five (5) pages within fourteen (14) days from the date of this Order, and Gagne shall submit a brief no longer than five (5) pages within fourteen (14) days from the date of this Order; and it is further

ORDERED that upon filing of those briefs, Roice shall have fourteen (14) days to respond to both briefs with **one** brief no longer than ten (10) pages; and it is further

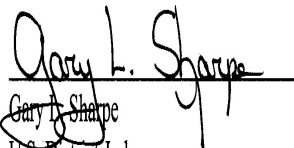
ORDERED that upon filing of Roice's brief, the County and Lorey will have seven (7) days to reply with a brief no longer than five (5) pages, and

the same for Gagne.

ORDERED that the Clerk shall provide a copy of this Order to the parties.

IT IS SO ORDERED.

November 9, 2018
Albany, New York



Gary L. Sharpe
U.S. District Judge